

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/04-01/06**

Date: **21 March 2018**

TRIAL CHAMBER II

Before: Judge Marc Perrin de Brichambaut, Presiding
Judge Olga Herrera Carbuca
Judge Péter Kovács

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF**

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

**Observations in relation to the victim identification and screening process pursuant
to the Trial Chamber's order of 25 January 2018**

Source: The Trust Fund for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

Counsel for the Defence

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Legal Representatives of Victims V01

Mr Luc Walley

Mr Frank Mulenda

Legal Representatives of Victims V02

Ms Carine Bapita Buyanandu

Mr Paul Kabongo Tshibangu

Mr Joseph Keta Orwinyo

The Office of Public Counsel for Victims

Ms Paolina Massidda

REGISTRY

Registrar

Mr Herman von Hebel

Victims Participation and Reparation Section

Mr Philipp Ambach

I. RELEVANT BACKGROUND

1. On 15 December 2017, Trial Chamber I (“Trial Chamber”) issued a decision (“Decision of 15 December 2017”),¹ in which it, *inter alia*:

- a) determined that 425 victims who had participated in the new reparations proceedings instituted by the Trial Chamber were eligible for the collective reparations awards ordered in the case;
- b) determined that these 425 eligible victims constituted only a sample of the potentially eligible victims and that hundreds to thousands of additional victims had suffered harms caused by the crimes for which Mr Lubanga was convicted; and
- c) ordered, by 15 January 2018, the Trust Fund to provide observations on the possibility of locating and identifying additional eligible victims with the assistance of the Office of Public Counsel for Victims, in its role as legal representative in the case, and the two teams of legal representatives of victims (“OPCV Legal Representative”, “Legal Representative V01”, Legal Representative V02”, and “Legal Representatives”, collectively).²

2. On 15 January 2018, the Trust Fund submitted observations as instructed in the Decision of 15 December 2017.³ Therein, the Trust Fund communicated that the assistance of the Legal Representatives would be of great benefit to it and that close collaboration with the Victim Participation and Reparations Section (“VPRS”) would also be important to the success of any victim identification and screening process. However, given the Court recess and holiday season subsequent to the Trial Chamber’s decision of 15 December 2017, the Trust Fund had not yet been able to hold detailed discussions with the aforesaid to determine how it intends to undertake the task of additional victim location and identification with their assistance.

¹ Corrected version of the « Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu », 21 December 2017, ICC-01/04-01/06-3379-Red-Corr, with two public annexes (Annex I and Annex III) and one confidential annex, ex parte Registry, Trust Fund for Victims, Legal Representatives of V01 and V02 groups of Victims and Office of Public Counsel for Victims (Annex II) and confidential redacted version of Annex II. The decision and annexes were given on 15 December 2017 and the corrected versions were filed on 21 December 2017.

² Decision of 15 December 2017, pp. 124-125.

³ Observations in relation to locating and identifying additional victims pursuant to the Trial Chamber's decision of 15 December 2017, 15 January 2018, [ICC-01/04-01/06-3386](#), para. 6.

3. On 25 January 2018, the Trial Chamber directed the Trust Fund to provide further information on its anticipated procedure for determining potential victims' eligibility in the collective reparations awards. In particular, the Trial Chamber asked the Trust Fund to answer four questions regarding the administrative procedure that the Trust Fund intends to put in place for examining, at the implementation stage, victims' eligibility for collective reparations ("25 January 2018 Order").⁴

4. The Trust Fund was subsequently granted three extensions of time to submit its response to the 25 January 2018 Order.⁵

5. On 16 March 2018, the Trial Chamber issued an order, instructing the Trust Fund to provide its responses to the four questions by 21 March 2018 and to provide additional information in relation to other matters by 13 April 2018.⁶

6. The Trust Fund hereby submits its responses to the Trial Chamber's four questions in relation to the identification and screening process in the *Lubanga* case.

II. PRELIMINARY OBSERVATIONS OF THE TRUST FUND

7. At the outset, the Trust Fund wishes to express its sincere apologies for the unfortunately unavoidable delay in submitting the present filing to the Trial Chamber. The Trust Fund has also taken careful note of the Trial Chamber's reminder as to its judicial authority at the implementation stage of reparations proceedings and wishes to assure the Trial Chamber that the Trust Fund fully acknowledges and respects authority in this regard.

8. Second, the Trust Fund also notes the Trial Chamber's request for further information, due on 13 April 2018. In this regard, the Trust Fund wishes to already inform the Trial Chamber that, in that filing, it will address in detail the two following issues, both of

⁴ Order Directing Further Information from the Trust Fund for Victims on the Procedure for Determining Victim Status at the Implementation Stage of Reparations, 25 January 2018, [ICC-01/04-01/06-3391-ENG](#), para. 5.

⁵ See *infra* footnote 6, ICC-01/04-01/06-3395, paras 5-7.

⁶ « Ordonnance enjoignant au Fonds au profit des victimes de déposer les documents sollicités par la Chambre sur le processus de sélection des nouvelles victimes, sur l'état d'avancement des discussions avec les acteurs concernés concernant la recherche et l'identification de nouvelles victimes, sur la possibilité d'affectation d'un montant supplémentaire aux réparations et sur l'état d'avancement de la mise en œuvre des réparations », ICC-01/04-01/06-3395.

which impact upon the timing of the identification of new victim beneficiaries in these proceedings, namely: 1) the deteriorating security situation in Ituri, particularly Djugu territory, and 2) the need to ensure the continued relevance, feasibility, and responsiveness of the Trust Fund's approved draft implementation plans (both symbolic and service based) in light of the changing security situation on the ground and based on the Trial Chamber's determination in its Decision of 15 December 2017 finding 425 individuals eligible for collective reparations in the present case. In its consultations with the Legal Representatives, both of these issues have been raised repeatedly in terms of the collective reparations currently proposed for the 425 eligible victims and with regard to the identification of additional victim beneficiaries.

9. Finally, the Trust Fund wishes to assure the Trial Chamber of its commitment to promptly consulting the Trial Chamber and seek its guidance and clarification on any question that arises in relation to the interpretation or application of the amended order for reparations in this case,⁷ including the identification and screening process for eligibility. In regard to this latter point, the Trust Fund notes that it has carefully studied the manner in which the Trial Chamber carried out its assessment of victims' dossiers, and evaluated the supporting documentation, of the 473 potentially eligible victims in its sample and intends to mirror this approach as closely as possible.

III. THE TRUST FUND'S RESPONSES TO QUESTIONS POSED IN THE 25 JANUARY 2018 ORDER

A. Whether the TFV intends itself to examine the dossiers of further victims and to determine their eligibility for reparations or whether the task will be delegated?

10. The Trust fund recognises that it is only one of the many actors that interact with victims under the Court's jurisdiction. The Trust Fund also recognises that, because reparations come at the very end of the Court's proceedings, other Court actors (in the Hague and in the field) have often already gathered a great deal of insight into the harms experienced and current needs and

⁷ ICC-01/04-01/06-3129-AnxA.

desires of victims, most clearly in the context of victims who have participated in the proceedings, either at trial or during reparations specific proceedings. In this same sense, the Trust Fund also recognises that other Court actors have developed specific expertise and, through practice, fine-tuned various processes, ranging from but not limited to assessing victim status, evaluating supporting documentation, and building networks of well-trained and efficient intermediaries in the field for purposes of victim outreach and identification. The Trust Fund considers this previous experience to be of particular relevance in so far as it relates to being able to provide assistance with respect to victim identification and verification for purpose of reparations in the case at hand.

11. The Trust Fund considers that it is not in the best interests of victims, its guiding principle of ‘Do no Harm’, or in line with its commitment to principle 15 of the UN Basic Principles on Reparation for Victims, which was adopted as a principle applicable in the *Lubanga* case, namely that victims should receive “prompt” reparations, for it to attempt to create on its own processes that others in the Court have more experience or expertise in carrying out.

12. Following from the above guiding considerations, the Trust Fund’s overall approach is to seek to utilise whenever possible the resources and knowledge available to it throughout the Court in order to put in place the most stream-lined and efficient reparations related processes possible during the implementation phase of reparations. While the Trust Fund retains the lead and decision-making role at this stage (subject to the Trial Chamber’s monitoring and oversight), it considers that it can be most effective and efficient by working in partnership with and receiving support and insight from the other relevant sections of the Court, particularly VPRS in the Hague and the field, the Outreach section, and also including the Legal Representatives.

13. In brief, the proposed eligibility screening and determination process for additional victims will entail: 1) an identification phase – where a person who seeks to have his or her eligibility for individualized collective reparations determined by the Trust Fund comes forward to provide his or her personal information and supporting documentation; and 2) a verification phase – in which an individual eligibility determination is finalised by the Trust Fund’s Board of Directors (“TFV Board”).

14. In relation to phase 1), the Trust Fund Secretariat will hire and train qualified persons (“statement takers”) to meet with and elicit information and supporting documentation from

potential new victims. As set out above, the Trust Fund considers it best to make use of resources and methods developed and successfully used by actors within the Court's structures, as well as those external to the Court, but engaging with it.

15. The Trust Fund notes that VPRS and the Legal Representatives have developed procedures to locate and identify victims to participate at trial and otherwise, by way of contacts made through intermediaries. Where VPRS and the Legal Representatives in the *Lubanga* case have worked with individuals who have proven to be ethical, effective, and reliable, the Trust Fund intends to establish contractual relationships with same for purposes of locating and identifying potentially eligible victims so long as no ethical constraints will prevent the Trust Fund from doing so.

16. The Trust Fund's statement takers will complete the requisite identification procedures in the field. A completed form and relevant supporting documents will then be forwarded to VPRS Headquarters in The Hague for data input, processing, and preliminary analysis.⁸ The preliminary analysis will consist of VPRS assessing whether the eligibility criteria established by the Trial Chamber have been met. This analysis will result in a recommendation to the Trust Fund Secretariat as to whether the person qualifies as a victim within the confines of the case. The Trust Fund Secretariat will review the VPRS recommendation and forward those dossiers to the TFV Board. In line with the procedures set out in the Trust Fund Regulations, the TFV Board will issue an administrative decision determining whether the person is a victim of Mr Lubanga's crimes and may accordingly access the service-based collective reparations awards.

17. By adopting this procedure, the Trust Fund submits that it will be able to make use of the specialized expertise of VPRS, given they have the existing capability to handle the storage and processing of data and documentation of up to thousands of potential victims in an administrative victim identification and verification process and experience in making initial eligibility assessments in the context of both trial participation and for purposes of reparations.

18. At the same time, the Trust Fund, and specifically the TFV Board, will maintain final authority over eligibility decisions and any other policy matters arising in relation to the victim

⁸ In a meeting between the Trust Fund and VPRS in February 2018, VPRS agreed to provide said services for the purposes of the Trust Fund's eligibility screening and determinations in the *Lubanga* case.

identification and verification process. More detailed specifics on the above-described procedure matters require further consultations between the Trust Fund and VPRS.

19. Finally, the Trust Fund has received preliminary information from VPRS as to the processing duration from data intake up to the issuance of an eligibility recommendation. These estimates meet the Trust Fund's needs with respect to what it considers to be a reasonable processing time. The Trust Fund notes that this depends on it giving VPRS sufficient lead-time so that VPRS can organise its resources to match when the Trust Fund is undertaking its statement-taking activities on the ground. The Trust Fund wishes to assure the Trial Chamber and VPRS of its commitment to keeping VPRS fully informed and doing so in a timely manner. At the same time, the Trust Fund notes and accepts that these preliminary estimates may be affected should activities arise in other situations or cases before the Court over which VPRS has responsibility, thereby potentially extending its data input to eligibility recommendation processing time.

B. Whether redress is envisaged for those persons whose dossiers are rejected and, if so, who will be tasked with the review?

20. In short, the Trust Fund does envision that redress should be available for any individuals who are determined to be ineligible. In this regard, the Trust Fund recalls that it has already proposed in these proceedings to establish an independent administrative review board that, with the assistance of legal counsel, would provide an opportunity to screened out victims to challenge a negative determination made by the TFCV Board. The Trust Fund notes that the inclusion of a right to an administrative review is a regular part of many domestic administrative proceedings and, for that matter, is also used at the Court in relation to certain administrative decisions that impact on the rights of various individuals.

21. While the Trust Fund has not yet determined what bases would constitute appropriate grounds upon which to seek a review of the TFCV Board's decision, it can affirm at the present time that any such review process – in its view – would require the provision of legal counsel to any persons determined to be ineligible.

22. The Trust Fund notes the recent Appeals Chamber judgment relevant to the reparations order in the *Al Mahdi* case, wherein the Appeals Chamber decided that victims determined to be ineligible for purposes of an individual reparations award may challenge the TFCV Board's

administrative decision before the Trial Chamber. While the Trust Fund has grave reservations about this decision, it does not consider this filing or these proceedings to be an appropriate forum to raise those issues. The Trust Fund would invite the Trial Chamber to consider whether this recent jurisprudence should be applied for purposes of eligibility for collective reparations in the *Lubanga* case, as well as whether it considers that there is a need for additional judicial review following the administrative review process, and to take a decision on this matter after consulting with the TFV Board.

C. Whether, once the Trust Fund, the Representatives of V01 and V02 Victims, and the OPCV have decided on a schedule for their enquiries *in situ*, the Trust Fund will set a cut-off date by which further victims must make themselves known in order to be considered for reparations in the case?

23. The Trust Fund considers that any ‘cut-off date’ should be determined in principle by reference to whether reparations programming is still ongoing that an eligible victim could participate in. In the Trust Fund’s view, the purpose of the identification process is to enable eligible victims to access the reparations to which they have a right. Further, the Trust Fund notes that the circumstances of the *Lubanga* case, both in terms of the continued stigma associated with being identified as a victim of Mr Lubanga’s crimes and the overall security situation, indicate that a flexible approach should be taken with respect to the timing of a potentially eligible victim coming forward.

24. Accordingly, the Trust Fund considers that any cut-off date should be determined only once the reparations programme is nearing its end. Hence, in answering this question, the Trust Fund points to the duration of its service-based reparations programme as the relevant benchmark, as opposed to the date of any planned *in situ* visits by the Trust Fund with the Legal Representatives.

25. In this regard, the Trust Fund notes that its draft implementation plan foresees program implementation to occur over a 3-year time frame. The Trust Fund considers it important that its victim identification activities for purposes of eligibility screening run in parallel to and up until the final six months of the (eventual) programme delivery period. Thus, at any time in the currently contemplated 3-year programme cycle, any potential victim who makes him or herself

known to the Trust Fund within the first 2.5 years, and who is determined to be eligible, would be able to access the collective reparations awards.

26. In other words, the availability of procedures by which potential victims can have their rights determined should be subject only to the constraint that program implementation is coming to an end (i.e. 6 months before the 3-year programme end date) so as to allow the Trust Fund sufficient time to formally identify and verify a claim and the eligible victim to receive meaningful value from the reparations programs.

D. The mode of monitoring envisaged by the TFV so that the Chamber can fulfill its task of monitoring and overseeing the implementation stage of the amended Order for Reparations

27. The Trust Fund recalls that it is required to report to the Trial Chamber on a periodic basis, i.e. every three months, in relation to programme implementation. With respect to the Trial Chamber's monitoring and oversight of the identification and verification process, the Trust Fund proposes the following:

- a) With respect to the identification process, information would be provided to the Trial Chamber also on a periodic, three month basis, including the areas where outreach had taken place and the number of individuals who had been interviewed.
- b) With respect to the screening process, information would also be provided to the Trial Chamber in the same periodic report regarding the number of individuals who had received an initial eligibility screening by VPRS, and had a determination by the TFV Board, as well information relevant to any administrative review proceedings.

28. In addition to the above, the Trust Fund also proposes that the Trial Chamber may wish to consider instituting an "audit" system, whereby, as an annex to the periodic report, it would be provided with a random sample of the victim dossiers, including those determined to be eligible by the TFV Board and those determined not to be eligible following the administrative review proceedings, so that the Trial Chamber would be in a position to better monitor the Trust Fund's implementation of the Trial Chamber's eligibility criteria and also be able to intervene in a timely manner if it notes any issues of concern. This would in turn permit the Trust Fund to make any

necessary adjustments to its screening process in an equally timely manner and provide further confidence to the victims themselves as to the legitimacy of the entire eligibility process.

FOR THE FOREGOING REASONS

The Board of Directors respectfully submits these observations regarding its envisioned victim identification and screening process.



Pieter W.I. de Baan
Executive Director of the Trust Fund for Victims,
on behalf of the Board of Directors of the Trust Fund for Victims

Dated the 21st of March 2018

At The Hague, The Netherlands